IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

CRP.No. 1465 of 2003()

(AS.59/1996 of ADDL. SUB COURT, ,KOTTAYAM
OS.134/1994 of MUNSIFF COURT, ETTUMANOOR)

REVN. PETITIONER/ RESPONDENT/DEFENDANT

DIVAKARAN NAIR, RAJBHAVAN,
PEROOR P.O., ETTUMANNOOR VILLAGE,
KOTTAYAM DISTRICT.

BY ADV. SRI.M.NARENDRA KUMAR
SRI.SALISH ARAVINDAKSHAN
SRI.ARUL KUMAR.P

RESPONDENT/APPELLANT/PLAINTIFF

RADHA SASIDHARAN, W/O. SASIDHARAN,
THENGUNTHOTTATHIL HOUSE,
KATTACHIRA P.O., ETTUMANOOR VILLAGE,
KOTTAYAM DISTRICT.

BY ADV. SRI.M.P.MADHAVANKUTTY

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.R.P.NO. 1465 OF 2003.

ORDER ON I.A.NO. 2802 OF 2003 IN C.R.P.NO. 1465 OF 2003.

DISMISSED.

12.12.2007 SD/- K.T. SANKARAN, JUDGE.

/TRUE COPY/

P.A. TO JUDGE.

K.T. SANKARAN, J.

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C.R.P. No. 1465 OF 2003

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Dated this the 12th December, 2007

O R D E R

The defendant in O.S.No. 134 of 1994 on the file of the court of the Munsiff, Ettumanoor is the revision petitioner. The suit was filed by the respondent for realisation of money. The trial court dismissed the suit. On appeal by the plaintiff as A.S.No. 59 of 1996 on the file of the court of the Addl. Sub Judge, Kottayam, the appellate court allowed the appeal and decreed the suit.

2. The case of the plaintiff is that the defendant issued Ext.A1 cheque on 25.06.1991 in favour of the plaintiff on borrowing a sum of Rs.10,000/- from the plaintiff The cheque was issued in discharge of the liability. On presentation of the cheque, it was dishonoured due to insufficiency of funds in the account of the defendant. On 02.07.1991, the plaintiff issued a notice to the defendant informing about the dishonour of the cheque. Since the defendant did not re-pay the amount , a complaint was filed by the plaintiff under section 138 of the Negotiable Instruments Act before the criminal court. A sum of Rs.13,700/- was claimed in the plaint. Interest at 12% was also claimed.

3. The defendant contended that the plaintiff is not entitled to any of the reliefs. His case is that he did not borrow any amount from the plaintiff and that he did not issue Ext. A1 cheque to the plaintiff. During the relevant period, the defendant was not having any account in the State Bank of Travancore, Ettumanoor branch, the account to which Ext.A1 was allegedly drawn. It is further contended that six cheque leaves belonging to

the defendant were lost and thereupon a letter was issued by the defendant to the Bank informing about the loss of the cheque leaves and as advised by the Bank Manager, the account was closed on 26.10.1990. The defendant further contended that his son Satheesan and the husband of the plaintiff were friends and the latter used to visit the house of the defendant occasionally. It is stated that the plaintiff's husband committed theft of the cheque leaves belonging to the defendant. The suit was filed by forging the signature of the defendant in the cheque so obtained. The defendant came to know of the theft of the cheque leaves only when the complaint was filed by the plaintiff before the criminal court. Ext.A1 cheque was returned not on the ground of insufficiency of funds but on the ground that the account was closed, it is contended. The defendant also contended that he is not liable to pay any amount to the plaintiff.

4. Before the trial court, the plaintiff was examined as P.W.1 and a witness who was allegedly present at the time of the transaction was examined as P.W2. The defendant was examined as D.W1. Ext.A1 cheque and Ext.B1 pass book are the documents made available before the trial court. The trial court compared the signature of the defendant in Ext.A1 cheque with the admitted signature of the defendant in his vakalath. The contention of the plaintiff was that the signature was deliberately put differently by the defendant in his vakalath. The admitted signature of the defendant was not made available before the trial court. None of the parties filed any petition to get the disputed signature compared with the admitted signature of the defendant, with the assistance of an expert. The defendant was not called upon to produce any document where his admitted signature is available. The court compared the signature

in the cheque with a disputed signature available in another document . Such a comparison was not proper.

5. The trial court relied on Ext.B1 and held that the account of the defendant was closed at the relevant time during which Ext.A1 cheque was issued. It was also held that the cheque was dishonoured not on the ground of insufficiency of funds, but on the ground that the account was closed. The trial court also held, on considering the evidence before it, that the defendant has been successful in rebutting the presumption under section 118 of the Negotiable Instruments Act. The trial court noticed that there was no averment in the plaint as to the date on which the amount was borrowed. The suit was not filed based on the original consideration as well. The claim in the suit is based on Ext.A1 cheque. In the plaint, there is no case for the plaintiff that the amount was borrowed on a particular date and cheque was issued on a subsequent date. But in the chief examination of P.W.1 , she stated that the amount was borrowed by the defendant on 01.06.1991 and the cheque was issued on 25.06.1991. In her cross examination, P.W.1 stated that the defendant came to her house and issued the cheque and on having been fully satisfied that the cheque was a proper cheque, she paid the money. This would indicate that payment of money and issuance of cheque were on the same date. The court put a question to P.W.1 after her cross examination and she stated that what is stated in the chief examination is correct and what she stated contrary in the cross examination is because of her 'mental agony'.

6. The appellate court held that Ext. B1 cannot be relied on to hold that the account of the defendant was closed. The Bank Manger was not examined and the

endorsement on Ext.B1 that the account was closed is not proved to be a genuine endorsement. The appellate court also held thus:

> *"By perusing Ext. B1 as rightly contended by the counsel for the appellant, I am also of the view that it does not appear to be a genuine document."*

There is no reason for arriving at this finding. The appellate court also held that the evidence of the defendant is highly improbable. This finding was arrived at on the basis that the cheque book and pass book were allegedly put on a particular table which was having a drawer and instead of keeping the same inside the drawer of the table, the defendant kept the cheque book on the table in a careless manner. The defendant being an Assistant Engineer in the Electricity Board, such a conduct cannot be believed, the court held. It was also held that the defendant did not prove that he informed the Bank about the loss of the cheque leaves. The appellate court erroneously thought that in the chief examination and cross examination of P.W.1, she stated that the cheque was issued on the same date on which the amount was advanced and she changed the version only when the court put a question to her. This is clearly wrong. As stated above, there are three versions; one in the chief examination, another in the cross examination and third one when the court put a question to P.W.1. At the appellate stage, the appellant/plaintiff produced certain documents as additional evidence to prove that the cheque was dis-honoured not on the ground of closure of the account. The court below did not accept those documents . The request for a remand of the case to the trial court to adduce evidence and to produce additional documents was also negatived.

7. Learned counsel for the revision petitioner submitted that the defendant was not against the remand of the case to the trial court as the defendant also wanted to examine the Bank Manager to prove the endorsement on Ext.B1 pass book. It is also submitted that the defendant objected to the marking of the additional documents produced at the appellate stage only on the ground that the documents were not produced in the trial court . It is stated by the counsel on either side that the documents other than the documents produced in the civil court were produced before the criminal court and that those documents would also be relevant for a proper decision of the case. Learned counsel for the revision petitioner submitted that a letter dated 29.12.1990 was sent by the plaintiff's husband to defendant's son Satheesan. This letter was put to P.W1 and she admitted the hand writing of her husband in that letter. Learned counsel submits that this document was not marked due to an inadvertent omission. He stated that this document is also relevant for a proper and effective consideration of the dispute involved in the case.

8. The contention raised by either parties would indicate that all the documents were not produced before the civil court. Both of them took care to produce the documents before the criminal court and those documents were not made available before the civil court. Though the trial court decreed the suit on the basis that the account was closed, the appellate court was not prepared to accept it on the ground that the Bank Manager was not examined. It is submitted that the Bank Manager was examined before the criminal court , but due to an omission, he was not examined before the civil court. The appellate court arrived at certain conclusions on the basis of

the evidence of P.W.1, which I have already indicated above, where the court below committed certain mistakes . Those mistakes are very material in the matter of arriving at a conclusion as to whether the evidence of P.W.1 can be believed. The appellate court disbelieved the case of the defendant about the theft of the cheque leaves on the basis of certain surmises and conjectures and on irrelevant materials.

9. After having heard the learned counsel on either side in great detail, I am of the view that in the interests of justice and to have a complete and final adjudication of the dispute involved in the case, it would be to the best interests of both the parties that the matter is remanded to the appellate court for fresh disposal after affording an opportunity to both parties to adduce oral evidence before the appellate court and to produce such other documents as they wish to produce . I am inclined to remand the matter to the appellate court also on the basis that the appellate court has not properly adverted to the evidence of P.W.1 and certain conclusions were arrived at on a mis-reading of the evidence of PW.1.

In the result, the Civil Revision Petition is allowed. The judgment of the lower appellate court is accordingly set aside and the matter is remitted to the lower appellate court for fresh disposal. The court below shall allow both the parties to adduce oral evidence before the appellate court. The parties would also be entitled to produce such other documents as they wish to produce. The appellate court shall consider the matter afresh in the light of the evidence already on record and also on the basis of the evidence that may be produced later. The appellate court shall dispose of the appeal as expeditiously as possible. The parties shall appear before the lower appellate court

on 20.01.2008. No order as to costs. The records shall be sent back to the lower appellate court.

K.T. SANKARAN,
JUDGE.

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